No. 80-1472

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

ALICE V. HOUSTON,

Petitioner,

V.

BENTTREE, LTD., an Oklahoma Corporation,

Respondent.

BRIEF OPPOSING PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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March, 1981

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INTRODUCTION

It is inconceivable that Petitioner seeks review of the subject action by this high Court. No issues as to any legal controversy affecting the merits of Petitioner's case were raised in the trial court. The trial judge decided the case strictly on the facts as he discerned them from the evidence. The law of the case was of no greater factor in the outcome than that routinely encountered in rear-end automobile collisions or collection of delinquent accounts.

Petitioner, in all events, was given a fair trial. She had ample opportunity to present her case and was allowed the widest possible latitude in offering all evidence, however vague in relevance. By whatever statute she might have been or now seeks to proceed the ultimate fact of discrimination was not then, and can not now, be proven because, as ruled by the trial court and affirmed by the Tenth Circuit, no discriminatory act ever occurred.

Grasping at legal straws to appeal, the Petitioner imaginatively created a superfluous and esoteric legal argument dealing with the time limit for bringing an action under 42 U.S.C. §3610. The Tenth Circuit Court of Appeals, after reviewing the merits of the case and preparatory to affirming the trial court, correctly evaluated the applicability of such an argument and stated in its opinion:

> "Appellant urges also that the district court erred in dismissing her cause of action under the Fair Housing Act. As we are convinced that the trial record supports the trial court's finding that there was no discrimination, we need not consider this argument. We have considered appellant's other arguments and find them to be without merit." App. 22a and 23 a [1]

While Petitioner may raise an interesting hypothetical legal question regarding the time frame for bringing a §3610 action, the applicability of such an argument to this case is totally absent. Regardless of the theory of law applied by the U. S. District Court and the Court of Appeals, no prejudice resulted to the Petitioner since she was unable to establish a factual basis to prove a case under any conceivable legal theory, including §3610.

This Court is asked to deny the Petition for Certiorari and allow the decision of the trial court to stand, as affirmed by the appellate court, for the reason that these decisions correctly decided the merits of the controversy and did manifest justice to the litigants under the facts of the case.

While Respondent feels that it is necessary to briefly advise the Court of its position on the issues raised by Petitioner, as stated, Respondent's fundamental opposition to Petitioner's request for certiorari is simply that the instant case rested upon a factual and not a legal controversy.

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1. App. references are to Appendix of Petition for A Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

STATEMENT OF THE CASE

Because of its disagreement with portions of Petitioner's Statements of the Case and Facts, Respondent offers its own Statements.

On June 6, 1978, Alice V. Houston filed a complaint in the United States District Court, Western District of Oklahoma, against Defendants, Benttree, Ltd., and Kilpatrick, alleging discriminatory housing practice under 42 U.S.C. §§1981, 1982 and 3604. Jurisdiction was invoked pursuant to 28 U.S.C. §1343 and 42 U.S.C. §3612. The Court sustained Defendants' Motion to Dismiss on August 26, 1978, as to Plaintiff's cause of action brought pursuant to 42 U.S.C. §3612. Contrary to Petitioner's Statement of the Case, the Court did not dismiss Plaintiff's claims under 42 U.S.C. §3604.

The claim against Defendant Kilpatrick was dismissed without Plaintiff's opposition on November 30, 1978. The case proceeded to trial on February 26 and 27, 1979, Honorable Ralph G. Thompson presiding, with judgment rendered on March 16, 1979, by the Court for Defendant Benttree, Ltd., with memorandum opinion of that same date.

Plaintiff's appeal to the United States Court of Appeals for the Tenth Circuit resulted in affirmance of the District Court opinion on December 2, 1980. The Tenth Circuit found, *inter alia*, that (1) Appellant did not prove several elements essential to her case, (2) the trial court's findings were supported by substantial evidence, (3) the correct legal standards were applied and (4) the issue of fair housing act dismissal was rendered mute by the trial court's finding of no discrimination.

STATEMENT OF FACTS

The following facts are adopted directly from the Tenth Circuit Court of Appeals' opinion, which capsulizes the findings of fact from Judge Thompson's Memorandum

Opinion. As illustrated by reference to the trial transcript, the Tenth Circuit findings of fact are amply supported by the evidence.

The Plaintiff is a black person who had come to Oklahoma City to assume an important position with the school system. (T. 63) She was looking for a suitable place to live and saw a "for sale" sign at the Defendant's condominiums. (T. 63, 71) She contacted a real estate agent to assist her in looking at the property. (T. 8, 64)

The agent told Plaintiff, about September 26, that the condominiums would not go on sale until October 1 or 2 at which time the Defendant was to have an "open house" on the property. (T. 73, 74, 78, 211, 273, 278, 333, 461, 467, 472) However, the Defendant was showing the finished units to prospective buyers. (T. 95, 319, 323) Plaintiff was shown the property on September 26, and she expressed interest in purchasing a two-bedroom unit. (T. 64, 65, 79, 96, 449) Defendant's sales agent told her that the one in which she was interested had already been sold. (T. 65, 96) Plaintiff looked at another unit and stated she would buy it. (T. 65, 96) The sales agent explained that the contracts were not yet ready and that the company would only use contracts prepared by its own attorney. (T. 65, 75, 82, 97, 114, 461-2, 464) An appointment was made to see the lawyer. (T. 65, 75, 97, 452, 464) At this point Plaintiff fully expected that she would be sold a unit. (T. 65, 75, 114)

On September 28, Plaintiff and her agent met with the attorney for Defendant who also stated the contracts were not ready and that an option to buy would not be extended to Plaintiff as the company insisted that the contract it prepared be used. (T. 66, 67, 76, 77, 82, 84, 89, 100, 116, 206, 208, 233) Plaintiff then asked if she could see a three-bedroom apartment. (T. 67) The lawyer arranged an appointment for her with Mr. Calhoun, Vice President of Benttree. (T. 67, 78) Plaintiff understood that the contract forms would be ready in a few days. (T. 77, 81, 82, 116, 331, 474) She was shown a unit

by Mr. Calhoun. (T. 67, 79, 102, 330) Plaintiff and her agent both testified that Mr. Calhoun was antagonistic and rude. (T. 68, 103, 105) Mr. Calhoun testified that he told Plaintiff at this showing that she could sign a contract at the open house on October 2. (T. 331) Plaintiff's agent phoned the attorney several times after their meeting seeking to obtain the contract forms but was not successful. (T. 106, 120, 210) On the afternoon of September 30, the attorney completed the contracts. (T. 203, 210, 235, 236, 255, 364)

Plaintiff felt she was badly and rudely treated by Defendant's agents. She decided that Benttree refused to allow her to make a binding offer because of her race. Plaintiff thus alleged that Defendant's excuse regarding the contracts was merely a sham. Also, she had been told that one unit had been sold and nevertheless she could not then buy one.

The open house did take place on October 2, but Plaintiff did not make an offer nor tender a deposit on or after that date. (T. 68, 83, 84, 85, 86, 106, 120, 121, 210, 273, 278, 333, 377, 388, 467, 472) Plaintiff filed a complaint with the Department of Housing and Urban Development on October 6, 1977. (T. 84, 472)

REASONS FOR DENYING THE WRIT

I. ABSENCE OF ANY FACTUAL FINDING THAT DISCRIMINATION OCCURRED RENDERS INAPPROPRIATE JUDICIAL REARTICULATION OF SETTLED STANDARDS OF PROOF.

Petitioner devotes ten pages of the Petition to convoluted argument based upon the generalities of national policy, citing as authority everything from state of the union messages to law review articles and surveys. The fact remains, however, that Petitioner's evidence fell far short of any standards of proof acknowledged by any court as

supportive of discrimination. No amount of grand verbage can elevate Petitioner's evidence beyond the succinct description applied by the Tenth Circuit:

> "Plaintiff felt that she was badly and rudely treated by defendant's agents." App. 20a

Hurt feelings are not equivalent to discrimination. Petitioner's confusion between the two follows a seemingly logical path in light of the utter deluge of literature and comment on the topic. Nevertheless, the fact remains that highest judicial intervention in restating settled standards of proof may not occur unless the seeking party's claim is meritorious and unless the standards are in a state of disarray. Petitioner fails on both counts. She has been a victim of nothing more, if anything, than garden-variety rudeness. Furthermore, as indicated by the Tenth Circuit and the District Court, discrimination standards are adequately and lucidly enumerated in *Duckett v. Silberman*, 568 F.2d 1020 (2d Cir. 1978), and *Bush v. Kaim*, 297 F.Supp. 151 (N.D. Ohio 1969). Obviously those standards by their very terms deal with housing. Surely, Petioner does not suggest that standards applied under Fair Housing actions should differ in degree of leniency of stringency from §1981-1982 proceedings.

The last vestige of differentiation – the opportunity for an attorney fee – was obliterated by the amendment of 42 U.S.C. §1988. Courts have uniformly applied identical standards of proof in measuring housing discrimination allegations. *Hodge v. Seiler*, 558 F .2d 284 (5th Cir. 1977). To ask this Court to fictionalize a difference between housing discrimination and housing discrimination is ludicrous.

Despite all of Petitioner's argument about insignificant factual incongruities, even Petitioner was forced to note that the District Court held that:

> "Plaintiff failed to prove that the units were available for sale at the time her offer was made. This is fatal to plaintiff's right to relief." App. 13a

The Tenth Circuit Court of Appeals reiterated that:

> "The court [trial court] found as a fact that the units were not placed on the market until October 2. The court also found that plaintiff was aware of this fact." App. 21a - 22a

Respondent has been unable to locate any case law by which a discrimination allegation was sustained when the housing site to be acquired was not on the market. Petitioner's accusation of owner manipulation of a unit's placement on the market might be well taken if there were any evidence to support that charge. Not a scintilla of evidence, however, exists. None of the units in the entire condominium project were for sale to anyone. No units had been sold, but some were being reserved. In fact, Chris Calhoun testified that he would have held a unit for Petitioner if requested to do so. (T. 331) Admittedly, this would have been difficult since Petitioner changed her mind several times as to the size and location of unit she desired. There was no evidence that terms had been given to any prospective purchaser; no negotiations were entered into, no offers entertained and no sales contracts accepted until after the "open house".

The standards of proof for discrimination are settled and Petitioner's evidence fell short. Therefore, this Court should not grant Petitioner's Writ for Certiorari.

II. TIME LIMITATION FOR FILING SUIT UNDER 42 U.S.C. §3610 IS IRRELEVANT WHEN PETITIONER FAILS TO PROVE DISCRIMINATION.

Petitioner totally misspeaks the applicability of her second question for review. At no time did the trial court dismiss Petitioner's 42 U.S.C. §3610 action. On August 26, 1978, Petitioner's 42 U.S.C. §3612 action was dismissed, and properly so because the lawsuit was undisputably filed more than one hundred eighty days after the alleged act of discrimination.

The §3610 question which Petitioner attempts to raise has nothing to do with the instant case. The District Court's reasoning, that §3610 and §3612 are dual avenues for enforcement of §3604, left open §3610 as an option to Petitioner. Respondent certainly had no responsibility for the manner in which Petitioner framed her complaint or presented her evidence. Petitioner was never denied an opportunity to amend her complaint and all evidence relating to any aspect of the alleged discrimination was accepted by the District Court. Petitioner's choice to ignore §3610 until the appellate stages of this proceeding indicates nothing more than an ambitious non sequitur.

CONCLUSION

Respondent is at a loss to ascertain why this Court should be called upon to reconsider anything about this case. The Petition is totally devoid of any substantial and applicable ground for review. Petitioner did not prove discrimination during her two-day trial and cannot now prove it from the trial's record. Further proceedings herein would avail nothing and result only in continued expense and inconvenience for the Respondent.

For the reasons set forth herein, the Petition for Writ of Certiorari should stand denied.

RESPECTFULLY SUBMITTED,

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By:_____
KENT F. FRATES

COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I, Kent F. Frates, attorney for Benttree Ltd., Respondent, hereby certify that on the _____ day of March, 1981, I served a copy of the foregoing Brief Opposing Petition for a Writ of Certiorari to the United States Court of Appeals For the Tenth Circuit by mailing three copies in a duly addressed envelope, with first class postage prepaid, to: Jack Greenberg, James M. Nabrit, III, Beth J. Lief, 10 Columbus Circle, Suite 2030 New York, New York 10019; and John W. Walker, Suite 1191, First National Bank Building, Little Rock, Arkansas 72201, Counsel for Petitioner.

KENT F. FRATES